INDEX

CITATIONS

719456—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 556

CITIES SERVICE GAS COMPANY, A CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION; PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI; THE CITY OF KANSAS CITY, MISSOURI; STATE CORPORATION COMMISSION OF KANSAS; AND CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion and order of the Commission (R. I, 28–70) are reported in 50 P. U. R. (N. S.) 65. The opinion of the circuit court of appeals (R. III, 1323–1349) is reported in 155 F. 2d 694.

JURISDICTION

The judgment of the circuit court of appeals was entered on April 30, 1946 (R. III, 1349–1350). A

petition for rehearing was denied on July 5, 1946 (R. III, 1393). The petition for a writ of certiorari was filed on September 30, 1946. The jurisdiction of this Court is invoked under Section 19 (b) of the Natural Gas Act and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, in fixing petitioner's interstate wholesale natural gas rates, it was proper for the Commission to determine cost of service for petitioner's entire business, including production and gathering, and to include production and gathering facilities in the rate base; if so, whether to include such facilities in the rate base at their actual legitimate cost.

2. Whether the Commission's subsidiary finding, in regard to existing depreciation, that "a qualified staff engineer inspected the company's properties * * *," was supported by substantial evidence.

3. Whether it was proper for the Commission to credit against petitioner's operating expenses the excess profits of an affiliate's gasoline extraction plant processing petitioner's gas.

4. Whether the Commission's refusal to make any allowance for federal income tax in petitioner's operating expenses, was proper where the rate of return used by the Commission, if applied to petitioner's entire business, would result in no federal income tax liability.

5. Whether the findings on allocations of cost made by the Commission between petitioner's interstate sales for resale, and its other, non-regulable sales, are sufficient to support the order of the Commission.[1]

STATUTE INVOLVED

The relevant portions of the Natural Gas Act are set forth in the Appendix, *infra*, pp. 23–33.

STATEMENT

The proceedings before the Commission arose out of a petition filed on May 1, 1939, by the Public Service Commission of Missouri against Cities Service Gas Company, the petitioner herein, alleging that the rates charged by petitioner for natural gas sold to various distributing companies for resale to domestic and commercial consumers in numerous communities in Missouri were unjust, unreasonable and unduly discriminatory, and requesting an investigation and the fixing of reasonable and lawful rates. By order of July 26, 1939, the Commission directed petitioner to show cause why its rates should not be reduced. Upon consideration of petitioner's response, the Commission, on October 20, 1939, and

[1] Petitioner also formulates questions as to "Jurisdiction of the Commission and Scope of Review" (Pet. 3–5) and due process (Pet. 19–21). These issues deal generally with the same matters which are separately raised in the questions above set forth, and their resolution must depend on the same considerations.

on its own motion, instituted an investigation of all of petitioner's interstate rates and charges. (R. I, 25–28.)

Hearings were begun on November 30, 1942, and held thereafter for forty-one days through February 2, 1943. Members of the Missouri Commission and the State Corporation Commission of Kansas sat jointly with the Commission's Trial Examiner, and the Corporation Commission of Oklahoma was represented by counsel. The City of Kansas City, Missouri, as well as the Missouri Commission, participated in the hearings as interveners. (R. I, 28–29.) After submission of briefs, the Commission on July 28, 1943, issued its opinion and the interim rate order here under review, finding that petitioner's interstate wholesale rates were excessive and requiring petitioner on and after September 1, 1943, to reduce such rates by an amount corresponding to a reduction of $4,445,871 for the year 1941, which the Commission used as a test year (R. I, 28–70).

A. *The petitioner.*—Petitioner is a wholly owned subsidiary of the Empire Gas and Fuel Company (R. I, 30, II, 787), which is in turn a subsidiary of the Cities Service Company (R. I, 30, III, 935). Organized on February 1, 1922, as the Empire Natural Gas Company, petitioner acquired the properties of a number of other producing and transporting companies, and upon reorganization on November 30, 1926, under its

present name, it acquired still other producing and transporting properties; all of these properties were owned or controlled, directly or indirectly, by the Cities Service Company (R. III, 934–936, 945–946).

As a result of these and other transactions with affiliated companies, petitioner owns properties which include 4,300 miles of main and field lines, and which are operated as an integrated natural gas pipeline system (R. I, 30–31). These pipelines extend from production areas in Texas, Oklahoma and Kansas to serve a wide area in northern Oklahoma, eastern Kansas, southern Nebraska and western Missouri (R. III, 1125), the company's principal markets embracing the metropolitan areas of Kansas City, St. Joseph, Joplin and Springfield, Missouri, and Kansas City, Lawrence, Topeka, Leavenworth, Wichita and Hutchinson, Kansas (R. I, 30–31). At these points, the gas is sold at the distribution gates under various contracts of "sale for resale," and to a considerable number of industrial and other direct sale customers (R. III, 1151).

B. *The rate order.*—The Commission, in determining the reasonableness of petitioner's interstate wholesale rates, used 1941 as the test year and found the actual legitimate cost of petitioner's property in service on December 31, 1941, including leaseholds and facilities for production and gathering, to be not more than $66,977,654 (R. I,

33–43, 66–67). In so doing, the Commission found that the trial examiner had properly excluded evidence as to so-called "reproduction cost" or "fair value" of petitioner's properties since "no necessity was shown to exist for the consideration" of such evidence (R. I, 31–32, 66).

From the $66,977,654 found to be the actual legitimate cost of petitioner's gas plant in service as of December 31, 1941, the Commission deducted $21,804,449 for "actual existing depreciation and depletion" (R. I, 67, 43–48), determined by the "straight-line service life method" (R. I, 43–45) and the "unit-of-production" method (R. I, 47, note 26) on the basis of a study presented by the Commission's staff (R. I, 44, III, 1039–1088).

The Commission also included in the rate base $1,576,357 for construction work in progress (R. I, 67, 48) and $1,818,194 as a "proper and reasonable allowance for working capital" (R. I, 67, 48–50). Accordingly, the Commission found "the reasonable rate base for the company as an assembled whole and an established natural gas utility" to be not more than $48,567,756 (R. I, 67–68, 50). On that rate base, it allowed an annual return of 6½% (or $3,156,904), which it found to be "fair and reasonable" and "liberal" (R. I, 68, 52).

Using 1941 as the test year, the Commission found that the company's operating revenues were $17,360,930 (R. I, 52, 68). In determining the amount

of petitioner's income available as a return on investment, it found that the operating revenue deductions (e. g. operating expenses, depreciation, depletion, amortization and taxes) and exploration and development costs shown on petitioner's books during that year totaled $10,625,749 (R. I, 52). The Commission found that petitioner's affiliate, Cities Service Oil Company, in extracting natural gasoline and other residuals from petitioner's gas, derived profits which were excessive to the extent of $380,000 per year and that, for purposes of this proceeding, petitioner's operating expenses should be reduced by that amount (R. I, 53–55). Applying the "service life" and the "unit-of-production" methods (*supra,* p. 6), to the allowed plant cost, the Commission found and allowed $1,709,060, and $70,871 for annual depreciation and depletion, respectively (R. I, 56–57, 68). For exploration and development costs, the Commission allowed $295,439 (R. I, 57, 68). Of the $3,035,466 of federal, state and local taxes shown on petitioner's books in the test year, the Commission disallowed $84,783, representing over-accruals, and deducted $1,882,148, representing "the reduction in the Company's 1941 Federal income tax which would have resulted if its net utility income had not exceeded a 6½% return" on the rate base (R. I, 57). This left an annual allowance for taxes of $1,068,535 (R. I, 57). The operating revenue

719456—46——2

deductions and exploration and development costs, thus allowed, totaled $7,810,137 for the test year (R. I, 57–58, 68). Deducting this amount from petitioner's operating revenue of $17,360,930 gave $9,550,793 which was $6,393,889 in excess of the 6½% fair return of $3,156,904 (R. I, 69, 58).

To determine the portion of the excess earnings applicable to petitioner's interstate sales for resale, the total cost of service (including a fair return) ($10,845,259) was allocated between such sales and petitioner's other sales (R. I, 59–61). Using the "demand and commodity" method of allocation as applied by the staff, the Commission found $7,264,986 to be the total cost of service (including a fair return) on petitioner's interstate sales for resale (R. I, 61, 69). Since petitioner's revenues from such sales during the test year totaled $12,764,651, the Commission found that petitioner's interstate wholesale rates were "unlawful, unreasonable and excessive" by at least $5,499,665, on the basis of the test year (R. I, 69, 61).

However, the Commission did not require petitioner to reduce its interstate wholesale rates "by the full amount of the excessive return indicated by the test year 1941" (R. I, 63, 69). The Commission took cognizance of the contemplated construction of a pipe line to petitioner's large reserves in the Hugoton field to obtain additional

gas needed by its system (R. I, 61–65).[2] The estimated cost of this line was $15,000,000, on which a 6½% return amounted to $975,000, and depreciation at the rate of 3½% amounted to $525,000, or a total of $1,500,000 (R. I, 63). The $1,500,000 was allocated between interstate sales for resale and other nonregulable sales on the same basis as petitioner's existing transportation system and this resulted in $1,053,794 being assigned to petitioner's interstate sales for resale (R. I, 63). The amount of $1,053,794 was accordingly allowed "as an *additional* cost over and above the reasonable cost of service" (R. I, 64).

The $5,499,665 excess return from petitioner's interstate wholesale sales, less the $1,053,794 of the additional allowance for the proposed Hugoton line allocable to such sales, left $4,445,871, the amount of the rate reduction ordered by the Commission (R. I, 65, 69).

Petitioner, on August 23, 1943, applied for a rehearing and stay of the Commission's order (R. I, 70–71), and, on September 21, 1943, the Commission denied such petition (R. I, 71). Thereafter, a petition for review was filed with the Circuit Court of Appeals for the Tenth Circuit,

[2] The Commission found that "after the lapse of a few years, the Hugoton line, unless other sources of gas closer to the Company's system are discovered, will supply gas to take the place of gas now purchased or produced elsewhere," and that "gas from the Hugoton Field will be substituted for gas now being obtained from other fields, particularly purchased gas" (R. I, 63–64).

which heard oral argument and, on April 30, 1946, Judge Phillips dissenting, affirmed the Commission order (R. III, 1323–1350). A petition for rehearing, filed on July 1, 1946, was denied on July 5, 1946 (R. III, 1354, 1393).

ARGUMENT

In a prolix and repetitious petition and brief in support thereof, petitioner requests this Court again to review various phases of rate regulation questions which this Court has only recently considered and resolved adversely to the very contentions now advanced by petitioner.[3]

We believe that the twenty-one questions which petitioner states as the issues involved (Pet. 3–21) merely set forth sundry aspects of, and are reducible to, the five questions discussed below.

A. *Production and gathering facilities.*—Petitioner seeks to reopen the question of including production and gathering facilities in the rate base and of including expenses of production and gathering in the cost of service—a question which has already been "squarely met and conclusively decided" (R. III, 1328) by this Court in *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U. S. 581. See, also, *Panhandle Eastern*

[3] *Federal Power Commission* v. *Natural Gas Pipe Line Company*, 315 U. S. 575; *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591; *Colorado Interstate Gas Company* v. *Federal Power Commission*, 324 U. S. 581; *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission*, 324 U. S. 635.

Pipeline Co. v. *Federal Power Commission*, 324 U. S. 635, 648; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 606, *et seq.* Petitioner seeks also to reargue, in a somewhat different guise, the alternative contention rejected in those cases that these facilities should be included in the rate base, if at all, at "fair value."

(1) Petitioner argues (Pet. 6, 47–49) that those cases do not finally determine that production and gathering facilities may be included in the rate base, since it claims they do not represent the views of a majority of this Court.

In this, petitioner is plainly in error, for it is clear from Mr. Justice Jackson's concurring opinion in the *Colorado Interstate* case (324 U. S. at 609), and his joining the majority, rather than the concurring, opinion in the *Panhandle* case (324 U. S. 635, 648–649), that on this point he is in full accord with the prevailing view.[4]

(2) Petitioner also contends (Pet. 8, 51, 55–56) that even if production and gathering facilities may be included in the rate base, the Commission erred in excluding evidence of their fair value, because it says the Commission assumed that it was legally required to act solely upon the basis of actual legitimate cost.

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[4] The concurring opinion in that case rested on the sole ground that the petitioners' objections were not urged in the application for rehearing before the Commission (324 U. S. at 650–651), whereas the majority additionally relied on the propriety of including production and gathering facilities in the rate base (324 U. S. at 648–649).

The Commission's opinion states that the evidence was rejected for the reasons it stated in excluding similar evidence in *Detroit* v. *Panhandle Eastern Pipe Line Company,* 3 F. P. C. 273, 278–280, 45 P. U. R. (N. S.) 203, 208–210 (R. I, 31). The Commission's action in that case was upheld by the Circuit Court of Appeals for the Eighth Circuit (143 F. 2d 488, 492–494), relying on *Pittsburgh Plate Glass Company* v. *National Labor Relations Board,* 313 U. S. 146, and this Court, in granting limited certiorari, refused to review that holding, 323 U. S. 700, 808.

The Commission's factual finding here that "no necessity was shown to exist for the consideration of * * * 'fair value' " (R. I, 66) negatives petitioner's contention that the Commission misconceived the applicable legal criteria, as does the comparison in its opinion of the relative reliability for rate-making purposes of actual legitimate cost, and evidence of "fair value" (R. I, 32).

Moreover, the use of an actual legitimate cost rate base in this case does not differ from its use in the *Hope* (320 U. S. 591), *Colorado Interstate* (324 U. S. 581), *Canadian River* (324 U. S. 581), and *Panhandle Eastern* (324 U. S. 635) cases. Under these cases it is the "end result" which is determinative and the court below correctly applied that test when it treated the economic merits of a rate base as being of no judicial con-

cern and said "we have not the right to intercede unless it is conclusively shown that failure to give consideration to the fair value of properties, including the valuable leasehold estates, will prevent the company from operating successfully as a public utility" (R. III, 1332). Petitioner, as the court below found, has not offered any such evidence (R. III, 1333).[5]

B. *Existing depreciation and depletion.*[6]—The Commission determined the amount of existing depreciation by the "straight-line service life method" (R. I, 43–48) which it usually uses. See, e. g., *Federal Power Commission* v. *Hope Natural Gas Company,* 320 U. S. 591, 596–598,

[5] Petitioner compares capital costs of gas produced in various fields with the cost of purchased gas (Pet. 8, 24–26, 57) as though applying the end result test which the Court used in the *Hope* case (320 U. S. 591, 602–605). This obviously misconceives the nature of that test. Moreover, petitioner's comparison fails to reflect the differences in production expense between fields due to differences resulting from variations in rentals and royalties. Such differences in expenses may fully offset any differences in capital costs. The comparison also omits from the figures for the cost of produced gas the expenses of exploration and development, the incurring of which constitutes the risks of that activity, although such risks are, of course, reflected in the cost of the purchased gas. But all those expenses, including all outlays risked in exploration and development, the Commission allowed as revenue deductions which, in effect, the ratepayer bears. The Commission's allowance of $295,439 for such exploration and development costs (R. I, 57, III, 999, 963) is the equivalent, when capitalized at 6½%, of an additional $4,500,000 in the rate base.

[6] Petitioner does not raise any question as to depletion.

606; *Colorado Interstate Gas Company* v. *Federal Power Commission,* 142 F. 2d 943, 959–960 (C. C. A. 10). While not directly attacking this method (cf. R. III, 1334), petitioner contends that the statements of the Commission's engineering witness that he had not personally inspected underground pipe or physically removed pipe from the ground to determine pitting or corrosion (R. I, 450–451) show that the Commission's opinion (R. I, 44) is without support in, and contrary to, the record when it states that a "qualified staff engineer inspected the Company's properties * * *" (Pet. 10).[7]

At most, petitioner is taking issue with only a subsidiary finding, since in the use of the "straight-line service life method," the observance of physical deterioration by inspection is only one of numerous elements taken into consideration (R. I, 427, 551–552, III, 1128–1129). Moreover, petitioner does not base its contention on any claim of inadequacy of the twelve-week field inspection of the above-ground properties

[7] Petitioner's incidental contention (Pet. 61) that there is insufficient evidence to support the Commission's inclusion of $2,200,000 of depreciation on properties acquired from The Kansas City Pipe Line Company, overlooks the evidence that the amount had been accumulated as a depreciation reserve by that company, which the acquiring company had failed to carry onto its books. The Commission merely reclassified this acquisition to show original cost and related depreciation reserve, rather than purchase price. (R. II, 569, III, 984–986.)

(R. I, 428–430, III, 1127–1128). As to the underground pipe, the record shows that among other things, the witness inspected reclaimed pipe and relevant records (R. I, 439, 451, III, 1133) and that he studied some 2020 pipe inspection reports (R. I, 451, 526–527). Such reports gave him substantially the same data (R. I, 550–551) as he could have obtained by the personal inspection which the company's refusal to dig the necessary holes prevented him from making (R. I, 436). From this and other evidence referred to in its opinion (R. III, 1333–1335), the court below rightly concluded that there was sufficient evidence to support the Commission's determination of accrued depreciation.

Furthermore, petitioner's objection goes to the process by which the Commission witness determined service lives and depreciation rates; but petitioner's witness declined to criticize the results reached by that process (R. II, 633–635, I, 43–45). Those rates are presently used by petitioner, on the basis of its own operating experience, for accruing depreciation on its books (R. I, 44, 441–445). And the accrued depreciation computed by the use of those rates is at least $7,500,000 less than petitioner's reserve for depreciation as reclassified (R. I, 41, 46–47, III, 1088).

C. *Profits from extraction operations.*—Gasoline and other residuals are extracted from peti-

719456—46——3

tioner's gas by its affiliate (R. II, 787), Cities Service Oil Company, which pays petitioner only for the loss in the heat value of its gas (R. I, 53, II, 788, 799). Such payments ran from $99,000 to $120,000 a year (R. I, 54), permitting the affiliate to realize an annual profit on this business of some $380,000[8] in excess of a 6½% return (R. I, 55). This excess the Commission treated as a credit to petitioner's operating expenses (R. I, 56), after finding that since the extraction of these residuals renders the natural gas more readily marketable and transportable, consumes a certain volume of the gas, and reduces the heat content, "the gas consumers are entitled to a fair proportion of the net earnings derived from the processing operation" (R. I, 53).

Petitioner contends that the extraction operations are not essential to its natural gas operations and that the Commission erroneously exercised regulatory jurisdiction over the affiliate (Pet. 12). These contentions are without substance.

Here, as in the *Hope* case (134 F. 2d 287, 307–308 (C. C. A. 4), reversed on other grounds, 320 U. S. 591, 594, note 2), extraction of the residuals is so closely associated with petitioner's transportation and sale of natural gas as to be

[8] No allowance for federal income tax was made in computing this figure (Pet. 11, 33, 63) because none was paid by the affiliate (R. III, 1021, note).

a part or a by-product of that business. Cf. *Panhandle* case, 3 F. P. C. 273, 290, affirmed 324 U. S. 635. Operating and marketing conditions are improved as a result of the processing while, on the other hand, some of the natural gas is consumed and the heating value of the remaining gas reduced (R. II, 770, 774, 778, 779).

Petitioner's further contention that the Commission was unlawfully exercising regulatory jurisdiction over the affiliate's gasoline extraction plant, is equally unsound. The Commission did no more than petitioner conceded it had a right to do, i. e., inquire into the reasonableness of the contract between affiliates and make the necessary allowances (Pet. 12, 63). *United Fuel Gas Company* v. *Railroad Commission of Kentucky,* 278 U. S. 300, 319–321. This is no more regulation of the gasoline extraction business than the Commission's use of data relating to production and gathering constitutes regulation of those activities. *Supra,* pp. 10–11. See also, *infra,* p. 19.

To prevent the Commission from so crediting excess profits would enable a regulated gas utility to syphon off profits to nonregulated affiliates by contracting out parts of its business (R. III, 1336), and the same considerations which sustain the disallowance of profits to affiliates are relevant here. In the *Colorado Interstate* case, 324 U. S. 581, 607, this Court affirmed the disallowance of all profits between affiliates in a leasehold transaction and in the *Colorado-Wyom-*

ing case, 142 F. 2d 943 (C. C. A. 10), the circuit court of appeals affirmed the Commission's disallowance of engineering fees paid to an affiliated company. See also *The California Oregon Power Company* v. *Federal Power Commission,* 150 F. 2d 25, 27 (C. C. A. 9), certiorari denied, 326 U. S. 781.

D. *Federal income taxes.*—In determining the amount of federal income tax to be allowed in operating expenses, the Commission computed "the reduction in [petitioner's] Federal income tax which would have resulted if its net utility income had not exceeded a 6½% return" on the rate base (R. I, 57). This reduction aggregated at least $1,882,148, the full amount of petitioner's federal income tax for 1941, the test year, and hence, if petitioner made no more profit on its non-regulable than on its regulable business, there would be no such tax liability to be allocated. As the court below pointed out in approving this treatment: "The Commission did no more than allocate to the non-jurisdictional sales the costs of earnings which were solely attributable to it." (R. III, 1337.)

Petitioner contends (Pet. 14, 67–68) that the Commission disallowed federal income taxes on its non-jurisdictional sales and thereby "regulated" its non-regulable earnings. This contention is analogous to the objections advanced by the companies in the *Canadian River* and *Colorado Interstate* cases. In those cases, it was con-

tended that because the cost of service which the Commission allocated between jurisdictional and non-jurisdictional sales included a 6½% return on "all the property used by petitioners in their various classes of business—intrastate sales, direct industrial sales, and interstate wholesale sales," the Commission thereby limited their non-jurisdictional earnings to a 6½% return. This court rejected that contention. 324 U. S. 581 at 593–594.

While apparently conceding that if it earned no more than 6½% on the over-all rate base, there would be no federal income tax liability, petitioner argues that the Commission's treatment of the tax liability question was inappropriate, and that when properly computed (Pet. 14)[9] a tax liability results which should have been included in cost of service, without recognizing that any such tax liability would be allocable to the non-regulable business.

The rate reduction applies only to the regulable business and should be allocated to that portion of the business solely. When that is done, the soundness of the Commission's action in not allocating any tax liability to the regulable business is demonstrated. The net income of the regulable

[9] Petitioner's computation is erroneous in that the amounts of $380,000 and $65,000 are added to the petitioner's net taxable income. Those amounts represent excess earnings which in fact will remain a part of the income of the affiliated company and cannot be reflected in the income tax return of petitioner.

business ($7,614,407) is roughly 79% of the total net income ($9,550,793) of the entire business.[10] 79% of petitioner's taxable income for 1941 ($6,057,181) is $4,829,390;[11] this represents the taxable income allocable to regulated business, and the corresponding rate reduction ($5,499,665) [12] clearly wipes out that taxable income.[13]

E. *Cost of service allocation.*—As pointed out by the Commission's opinion, petitioner agrees in principle with the so-called "demand and commodity" method used by the Commission of allocating costs of service between its interstate sales for resale and its other, nonregulable sales (R. I, 60). It contends, however, that "there are

[10] The total net income, $9,550,793, is derived by subtracting the cost of service excluding return, $7,688,355, from total gas revenues, $17,239,148 (R. I, 52, note 34). The cost of service excluding return, $7,688,355, is arrived at by subtracting return, $3,156,904 (R. I, 57, note 41), from cost of service, $10,845,259 (R. I, 61).

The net income of the regulable business, $7,614,407, is derived by subtracting cost of service excluding return allocable to regulable business, $5,150,244, from regulable gas revenues, $12,764,651 (R. I, 61). The cost of service excluding return allocable to regulable business, $5,150,244, is arrived at by multiplying the cost of service excluding return, $7,688,355 (above), by the ratio between the cost of service including return allocable to the regulable business, $7,264,986 (R. I, 61) and the total cost of service including return, $10,845,259 (R. I, 61).

[11] See following footnote.

[12] Additional allowance for expense of Hugoton gas, $1,053,794 (R. I, 64), should be deducted from each of these figures; however, the result would be the same.

[13] Statutory tax deductions would relieve petitioner of income tax liability even though for rate purposes it earned a 6½% return.

no Commission findings of fact disclosing the governing 'considerations of fairness' or what 'judgment' factors entered into the adoption of 'the staff's method' " (Pet. 16.)

This is the same contention which was raised in cognate circumstances and, after careful consideration, rejected by this Court in the *Canadian River* and *Colorado Interstate* cases (324 U. S. 581, 586–595). Here, as in those cases, the Commission adopted its staff's method without change [14] and hence the Commission's findings read together with the exhibits setting forth the staff's method are sufficiently detailed so that "the path which it followed can be discerned" and is not "so vague and obscure as to make the judicial review contemplated by the Act a perfunctory process" (324 U. S. at 595), although the case was tried and decided prior to those decisions and prior to the decision in the *Colorado-Wyoming* case (324 U. S. 626). The latter was a clearly different case, since there the method of allocation adopted in the Commission's findings departed from its staff's method, and as a result there were ambiguities in the record which this Court was unable to resolve, were it its province to do so (324 U. S. at 632).

[14] The Commission stated in its opinion (R. I, 61), that "Applying the staff's method of allocation, we find that $7,264,986 represents the total cost of service (including a fair return) for the sales subject to our jurisdiction, and $3,580,273 represents the cost of service for the sales not subject to our jurisdiction."

CONCLUSION

The decision below is correct and fully accords with the decisions of this Court in the *Hope, Colorado Interstate* and *Panhandle Eastern* cases. There is no conflict of decisions. We respectfully submit that the petition for a writ of certiorari should be denied.

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OCTOBER 1946.

APPENDIX

The pertinent provisions of the Natural Gas Act of 1938, c. 556, 52 Stat. 821, 15 U. S. C. 717, *et seq.*, are as follows:

SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

* * * * *

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission,

and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public

inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference

thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or

contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

SEC. 6. (a) The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

(b) Every natural-gas company upon request shall file with the Commission an

inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

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SEC. 9. (a) The Commission may, after hearing, require natural-gas companies to carry proper and adequate depreciation and amortization accounts in accordance with such rules, regulations, and forms of account as the Commission may prescribe. The Commission may from time to time ascertain and determine, and by order fix, the proper and adequate rates of depreciation and amortization of the several classes of property of each natural-gas company used or useful in the production, transportation, or sale of natural gas. Each natural-gas company shall conform its depreciation and amortization accounts to the rates so ascertained, determined, and fixed. No natural-gas company subject to the jurisdiction of the Commission shall charge to operating expenses any depreciation or amortization charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation or amortization other than that prescribed therefor by the Commission. No such natural-gas company shall in any case include in any form under its operating or other expenses any depreciation, amortization, or other charge or expenditure included elsewhere as a depreciation or amortization charge or otherwise under its operating or other expenses. Nothing in this section shall limit the power of a State commission to determine in the exercise of its jurisdiction, with respect to any natural-

gas company, the percentage rates of depreciation or amortization to be allowed, as to any class of property of such natural-gas company, or the composite depreciation or amortization rate, for the purpose of determining rates or charges.

(b) The Commission, before prescribing any rules or requirements as to accounts, records, or memoranda, or as to depreciation or amortization rates, shall notify each State commission having jurisdiction with respect to any natural-gas company involved and shall give reasonable opportunity to each such commission to present its views and shall receive and consider such views and recommendations.

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SEC. 14. (a) The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of this act or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this act or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation to the Congress. The Commission may permit any person to file with it a statement in writing, under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish in the manner authorized by section 312 of the Federal Power Act, and make available to State commissions and municipalities, information concerning any such matter.

(b) The Commission may, after hearing, determine the adequacy or inadequacy of the gas reserves held or controlled by any natural-gas company, or by anyone on its behalf, including its owned or leased properties or royalty contracts; and may also, after hearing, determine the propriety and reasonableness of the inclusion in operating expenses, capital, or surplus of all delay rentals or other forms of rental or compensation for unoperated lands and leases. For the purpose of such determinations, the Commission may require any natural-gas company to file with the Commission true copies of aii its lease and royalty agreements with respect to such gas reserves.

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SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and

matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

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SEC. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within

sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modi-

fication or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

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